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YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. **MARCO ANTONIO TOPETE,** Defendant.	Case No.: CR08-3355 Department No. 6 NOTICE OF MOTION AND MOTION TO BAR DEATH PENALTY FOR FAILURE TO COMPLY WITH THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT Defense Trial Motion No. 2

TO: THE DISTRICT ATTORNEY OF YOLO COUNTY

PLEASE TAKE NOTICE that on May 17, 2010, or as soon thereafter as the matter may be heard, in Department 6 of the above entitled court, defendant, Marco Antonio Topete, by and through attorneys, Hayes H. Gable, III and Thomas A. Purtell will move the court for an order barring the imposition of the death penalty in this case on the grounds that the 1978 death penalty statute, as written, interpreted and applied, violates the Eighth Amendment to the United States Constitution and its California counterpart.

This motion is based on this notice, the pleadings, records, and files in this action, the attached memorandum of points and authorities and oral argument to be presented at the hearing.

DATED: May 17, 2010

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YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. **MARCO ANTONIO TOPETE,** Defendant.	Case No.: CR08-3355 Department No. 6 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO BAR DEATH PENALTY FOR FAILURE TO COMPLY WITH THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT

TO: THE DISTRICT ATTORNEY OF YOLO COUNTY

I.

INTRODUCTION: THE CONSTITUTION REQUIRES AN OBJECTIVE, GENUINE NARROWING OF PERSONS ELIGIBLE FOR DEATH

The Eighth Amendment[1] to the United States Constitution "requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, 541 citing *Gregg v. Georgia* (1976) 428 U.S. 153 and *Furman v. Georgia* (1972) 408 U.S. 238.) If a state chooses to enact a death penalty, it must "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." (*Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

While the *Furman* text is difficult to decipher, its central theme is clear: a state's death penalty scheme cannot be arbitrary at any phase. The jury cannot arbitrarily decide to execute a defendant any more than the state may arbitrarily select a defendant for exposure to the penalty of death. It is the latter prohibition that is the subject of this motion.

What the Justices commented on, over and over again, was, on the one hand, the arbitrariness with which the state created a huge "death eligible" class of defendants, and on the other, the small percentage of those "death eligible" convicted murderers who were actually sentenced to death. In other words, there appeared to be no funneling of cases, no rational method for weeding out those defendants who should not be eligible for death from those who should be eligible. Instead of providing a fair, consistent, predictable and reviewable mechanism for the infliction of the ultimate punishment, Georgia's system, with its rare, random,

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[1] The term "Eighth Amendment" is used herein to represent a claim based upon Article I, Sec. 17 of the California Constitution also. (Cf. *People v. Mincey* (1992) 2 Cal.4th 408, 476.)

unpredictable and unreviewable death penalty process, was the legal system equivalent to being "struck by lightening."

This is what the Justices in *Furman* said:

> "[T]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness."

(*Furman, supra*, at 249 [Justice Douglas] quoting Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1792.)

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause -- that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.

(*Ibid.* at 274 [Justice Brennan].)

> [W]hen a severe punishment is inflicted "in the great majority of cases" in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is "something different from that which is generally done" in such cases there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes "in an enlightened democracy such as ours," that extremely severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

(*Ibid.* at 276-277 [Justice Brennan] [citations and footnote omitted])

> The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime.

(*Ibid.* at 291 [Justice Brennan].)

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of ... murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact

> been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

(*Ibid.* at 309-310 [Justice Stewart] [footnotes omitted].)

> [T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.

(*Ibid.* at 313 [Justice White].)

Furman's progeny, from *Gregg* forward, spell out an undisputed constitutional mandate: death penalty statutes must, by rational and objective criteria, genuinely narrow the group of murderers from whom the ultimate penalty may be exacted:

> [T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

(*McCleskey v. Kemp* (1987) 481 U.S. 279, 305; see *Arave v. Creech* (1993) 507 U.S. 463, 474; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465.)

This narrowing function must be accomplished by the legislature through defining those categories of murderers eligible for the most severe penalty. Thus, in response to the *Furman/Gregg* mandate, "the States have adopted various narrowing factors that limit the class of offenders upon which the sentencer is authorized to impose the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341-342.)[2]

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[2] These narrowing factors which a jury must find to make a murderer death-eligible are often denominated "aggravating circumstances" or "aggravating factors" in other states. (See *People v. Bacigalupo, supra,* at 468.) To avoid confusion with California's "aggravating factors" (Pen. Code §190.3), they will be referred to throughout as "narrowing factors."

To survive constitutional challenge, the narrowing factors must not simply *appear* to narrow the class eligible for the death penalty, or narrow it "in theory." The state's statute must in fact **genuinely narrow** the class eligible for the death penalty.

> To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . .
>
> Our cases indicate, then that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: *they circumscribe the class of persons eligible for the death penalty.*

(*Zant v. Stephens* (1983) 462 U.S. 862, 877-878 (emphasis added).)

The requirement that the jury find at least one objectively-defined narrowing factor before moving to the next step (the actual consideration of life versus death) satisfies the *Furman/Gregg* concerns by channeling the jury's discretion. (*Blystone v. Pennsylvania*_(1990) 494 U.S. 299, 306; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244-245.)[3]

An analysis of the evolution of the California death penalty scheme reveals that, despite its appearance, and even its originally sincere effort, our state's statute does not come close to meeting the *Furman/Gregg* standard for narrowing of death-eligible defendants. In truth, history

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3 A statutory scheme which failed to "genuinely narrow" the class of murderers who were death-eligible, would not only violate the Eighth Amendment, but would also violate due process because it would leave to the complete discretion of the prosecutor to choose the few defendants as to whom the death penalty would be sought. As the Supreme Court has explained:

> Where the legislature fails to provide ... minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

(*Kolender v. Lawson* (1983) 461 U.S. 352, 358, quoting *Smith v. Goguen* (1974) 415 U.S. 566, 575 [alteration in original].) By contrast, if prosecutorial discretion is limited by constitutional narrowing factors, exercise of that discretion will not raise due process concerns:

> [O]ne sentenced to death under a properly channeled death penalty scheme cannot prove a constitutional violation by showing that other persons whose crimes were superficially similar did not receive the death penalty. The same reasoning applies to the prosecutor's decision to pursue or withhold capital charges at the outset.

shows that since 1978, California's law has been on one giant slide back into the pre-*Furman* ooze of unconstitutionality.

II.

CALIFORNIA LAW HAS ABANDONED ANY ATTEMPT TO NARROW THE CLASS OF FIRST DEGREE MURDERERS ELIGIBLE FOR DEATH

From 1874 until the Supreme Court's decision in *Furman*, California jurors had complete discretion in imposing the death penalty in all cases of first degree murder. In 1973, just after *Furman*, the California legislature adopted a mandatory death penalty to be applied upon proof of one of five special circumstances. (Stats. 1973, ch. 719, §§ 1-5, pp. 1297-1300.) However, because of its mandatory nature, this statute was held unconstitutional in *Rockwell v. Superior Court* (1976) 18 Cal.3d 420.[4]

In response, when the California legislature again reestablished the death penalty in 1977, it returned discretion to the jury in applying the death penalty but attempted to limit that discretion by requiring that one of twelve "special circumstances" be found beyond a reasonable doubt to make a murderer "death-eligible." (Stats. 1977, ch. 316, pp. 1255-1266.) Under the new statute, first degree murder was "punishable by life imprisonment except for extraordinary cases in which special circumstances are present." (*Owen v. Superior Court* (1979) 88 Cal.App.3d 757, 760, quoted with approval in *People v. Green* (1980) 27 Cal.3d 1, 48, overruled on other grounds by *People v. Hall* (1986) 41 Cal. 3d 826, 834 n.3 and *People v. Martinez* (1999) 20 Cal. 4th 225, 233-237.)

(*People v. Keenan* (1988) 46 Cal.3d 478, 506, cert. den. (1989) 490 U.S. 1012 [citations omitted and emphasis added].)

[4] See generally *Woodson v. North Carolina* (1976) 428 U.S. 280; *Sumner v. Shuman* (1987) 483 U.S. 66. The Supreme Court has consistently held that the constitution demands individualized sentencing procedures; thus, any mandatory death penalty law, no matter how circumscribed, is unconstitutional.

> The heart of that statute was the concept of 'special circumstances.' The jury's discretion to impose the death penalty was strictly limited to those cases of first degree murder presenting one or more of several enumerated special circumstances; in all other cases the murder, no matter how willful, deliberate and premeditated, was a non-capital offense.

(*Green*, *supra*, 27 Cal.3d at 49.) In short, "special circumstances" were intended to constitutionally define and limit death eligibility in this state:

> At the very least, therefore, the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not.

(*Ibid.* at 61.)

Whether the special circumstances in the 1977 statute in fact performed the constitutionally-required narrowing function was never specifically decided by the courts. In finding the 1977 law constitutional, the United States Supreme Court *presumed* that the special circumstances narrowed the class of those eligible for the death penalty,[5] but left open the possibility that additional evidence might be presented to show that the law did not comply with the *Furman/Gregg* narrowing mandate. (*Pulley v. Harris* (1984) 465 U.S. 37, 53-54.)[6] However, before a thorough constitutional analysis of the existing "special circumstances" scheme could take place, the proverbial floodgate was opened.

The 1977 law was quickly superseded in 1978 by the enactment of Proposition 7 (the "Briggs Initiative"). According to its author, the initiative "would give Californians the toughest death-penalty law in the country." (California Journal Ballot Proposition Analysis, 9 Calif. J. [Special Section, November 1978] p. 5.) The intent of the voters, as clearly expressed by the

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[5] The Court said: "By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53.)

[6] The California Supreme Court also had left open this constitutional question. (See *People v. Green, supra,* 27 Cal.3d at p. 49.)

authors of the ballot proposition arguments, was absolutely unconstitutional: to make the death penalty applicable to ALL murderers.

> And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.

(1978 Voter's Pamphlet, p. 34.)[7]

The Briggs Initiative sought to make every murderer "death eligible" by drastically expanding the number of special circumstances from 12 to 26. Later, three additional special circumstances, (murder of a peace officer, mayhem, and rape by foreign object) were added by Propositions 114 and 115 in 1990. (See *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 985.) Three more special circumstances (carjacking, killing a juror, and drive-by shooting) were added by Propositions 195 and 196 in 1996. (See Bill Jones, Cal. Secretary of State, Statement of Vote, Primary Election March 26, 1996, at 52-54, available at http://www.sos.ca.gov/elections/sov/1996-primary/1996-primary-sov.pdf.) At the time of the instant offense and since the passage of Proposition 21, there are now 33 "special circumstances."8 (Shatz (2007) *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 Fl.L.Rev. 719, 725-728; *see* Proposition 21, § 11, available at http://primary2000.sos.ca.gov/VoterGuide/Propositions/21text.htm; Bill Jones, Cal. Secretary of

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[7] The goal of the voters could not be more plainly stated or more plainly unconstitutional, a fact glaringly absent from any discussion of this law – despite the fact that the Supreme Court has repeatedly held that election ballot arguments are entitled to great weight in interpreting statutes. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 740 fn. 14; *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 943 fn. 5.)

8 One of the 33 special circumstances, while remaining in the statute – PC§190.2(a)(14): "especially heinous, atrocious, or cruel" – was invalidated in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797; see also, *Godfrey v. Georgia* (1980) 446 U.S. 420 (Supreme Court held that "outrageously or wantonly vile, horrible or inhuman" did not provide any restraint against the arbitrary and capricious application of the death penalty. (*Ibid* at 428-429.).)

State, Statement of Vote, Primary Election, March 7, 2000, at 153-155 *available at* http://www.sos.ca.gov/elections/sov/2000_primary/measures.pdf.)

Although it has never directly addressed the historical development of this incredibly expanding law, the California Supreme Court has continued to *assume* that California's "special circumstances" scheme continues "to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty." (*People v. Visciotti* (1992) 2 Cal.4th 1, 74; accord, *People v. Bacigalupo*, *supra*, 6 Cal.4th at p. 467.)

> Under our death penalty law, therefore, the section 190.2 "special circumstances" perform the same constitutionally required 'narrowing' function as the "aggravating circumstances" or "aggravating factors" that some of the other states use in their capital sentencing statutes.

(*People v. Bacigalupo*, *supra,* at 468.)

More recently, in *People v. Sanchez* (1995) 12 Cal.4th 1, overruled on other grounds by *People v. Doolin* (2009) 45 Cal. 4th 390, the Supreme Court addressed the narrowing issue in the very context raised here. The defendant in *Sanchez* raised the narrowing issue by offering proof of empirical, case-related data[9] to the court which supported the proposition that California's so-called "special circumstances" scheme allowed nearly all defendants convicted of first degree murder to be eligible for the death penalty in violation of the Constitution. Previous challenges had been turned away for lack of such data: "[D]efendant has not demonstrated on this record, or through sources of which we might take judicial notice, that his claims are empirically accurate, or that, if they were correct, this would require the invalidation of the death penalty law."

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9 Sanchez relied upon the first study of murder cases accomplished by Professor Steven Shatz later reported in S. Shatz & N. Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U.L.Rev. 1283, 1326-1339 (December 1997).

(*People v. Crittendon*_(1994) 9 Cal. 4th 83, 155, quoting *People v. Wader* (1993) 5 Cal.4th 610, 669.)

The California Supreme Court made surprisingly quick work of this important and complex issue with the following statement:

> We have repeatedly considered and rejected this identical claim beginning with our decision in *People v. Rodriguez* (1986) 42 Cal. 3d 730, 770-779. (See *People v. Crittenden* (1994) 9 Cal. 4th 83, 154-156.) Moreover, in *Tuilaepa v. California, supra,* and in a number of previous cases, the high court has recognized that "the proper degree of definition" of death-eligibility factors "is not susceptible of mathematical precision"; the court has confirmed that our death penalty law avoids constitutional impediments because it is not unnecessarily vague, it suitably narrows the class of death-eligible persons, and provides for an individualized penalty determination. (*Tuilaepa v. California, supra,* 512 U.S. at pp. - [129 L. Ed. at pp. 761-764] and cases cited.) Defendant's argument fails to convince us to revisit the issue. (*Ashmus, supra,* 54 Cal. 3d at pp. 1009-1010.)

(*People v. Sanchez* (1995) 12 Cal.4th 1, 60-61.)

The trouble with the Supreme Court's terse analysis is that the cases it cites in support of its dismissal of Sanchez' constitutional challenge do not support its holding. As stated above, *Crittenden* rejected the "narrowing" argument for lack of specific data – data that was presented in *Sanchez*. (*People v. Crittenden, supra,* at 155.) In *People v. Rodriguez* (1986) 42 Cal. 3d 730, the appellant did not raise this particular constitutional challenge. Likewise, in *Tuilaepa v. California*, the appellant raised issues regarding the constitutionality of certain **§190.3 factors** *without raising constitutional questions regarding* ***§190.2***. (*Tuilaepa v. California* (1994) 512 U.S. 967 at 975.) Likewise, in *Ashmus*, there is no discussion of the narrowing requirement of *Furman*. The Court describes the appellant's claim as follows: the "1978 death penalty law is facially invalid under the United States and California Constitutions, and hence that the judgment of death entered pursuant thereto is unsupported as a matter of law." The court then "follows"

Rodriguez and summarily denies the claim. (*People v. Ashmus* (1991) 54 Cal. 3d 932, 1009-1010.)

In contrast, the California Supreme Court has, on several occasions, addressed the constitutionality of particular individual special circumstances.[10] However, neither our court, nor the United States Supreme Court, has addressed whether the California scheme as a whole complies with the *Furman/Gregg* narrowing mandate.

For example, what *Tuilaepa* really involved was a review of companion cases, each of which objected to three factors found in §190.3 for Eighth Amendment violations based upon vagueness: factors (a) "circumstances of the crime"; (b) "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"; and (i) "age of the defendant at the time of the crime." (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-977.) As stated above, the court took great pains to differentiate the "eligibility" decision under §190.2 – in *Tuilaepa's* case, felony murder – from the "selection" process under §190.3. "Petitioners do not argue that at the special circumstances found in their cases were insufficient, so we do not address that part of California's scheme save to describe its relation to the selection phase." (*Tuilaepa v. California*, *supra*, at 975.) The court went on to affirm the death sentences finding that none of the challenged sentencing factors violated the Constitution.

In his dissent in *Tuilaepa*, Justice Blackmun notes the limitations of the majority's decision:

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[10] See, e.g., *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797 (holding unconstitutional subsection (a)(14) ["heinous, atrocious, or cruel"]); *People v. Coleman* (1988) 46 Cal.3d 749, cert. den. (1989) 489 U.S. 1100 [103 L.Ed.2d 943, 109 S.Ct. 1578] (upholding subdivision (a)(17) [felony murder]); *People v. Edelbacher* (1989) 47

> Of particular significance, the Court's consideration of a small slice of one component of the California scheme says nothing about the interaction of the various components -- the statutory definition of first-degree murder, the special circumstances, the relevant factors, the statutorily required weighing of aggravating and mitigating factors, and the availability of judicial review, but not appellate proportionality review -- and whether their end result satisfies the Eighth Amendment's commands. **The Court's treatment today of the relevant factors as "selection factors" alone rests on the assumption, not tested, that the special circumstances perform all of the constitutionally required narrowing for eligibility. Should that assumption prove false, it would further undermine the Court's approval today of these relevant factors.**

(*Tuilaepa v. California*, *supra*, at 994-995, Blackmun, J., dissenting (emphasis added).)

Justice Blackmun emphasized that, despite its holding, the United States Supreme Court has *never* given California's system "a clean bill of health":

> [T]he Court's opinion says nothing about the constitutional adequacy of California's **eligibility** process, which subjects a defendant to the death penalty if he is convicted of first-degree murder and the jury finds the existence of one "special circumstance." By creating nearly 20 such special circumstances, California creates an **extraordinarily large death pool**. *Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.*

(*Ibid.* at 994 [footnote omitted]; see also *Ibid.* at 984, Stevens, J. concurring in the judgment (emphasis added).)

If anything, Justice Blackman was conservative in his description of California's death penalty scheme by counting "felony murder" as only one special circumstance instead of the 13 they now represent. And since the time of Justice Blackmun's observations, California's "extraordinarily large death pool" has only grown deeper and wider. By original design and continued additions, California's "special circumstances" system does nothing to narrow the

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Cal.3d 983 (upholding subdivision (a)(15) ["lying in wait"]); *People v. Raley, supra*, 2 Cal.4th 870 (upholding (a)(18) ["torture"]).

numbers of first degree murderers eligible for the death penalty – a clear violation of the principles of *Furman* and its progeny.

A. Penal Code Section 190.2 on its Face Fails to Narrow The Class of Death Eligible Murderers

In enacting the 1978 version of the present California Penal Code section 190.2, the voters came close to achieving their stated purposes: they gave California one of the broadest -- probably the broadest -- death penalty statutes in the country[11] and assured that a substantial majority of first degree murderers (and a majority of all murderers) would be death-eligible. Because of the substantial overlap between the special circumstances listed in §190.2 and the factors listed in Penal Code §189 (definition of first and second degree murder), most first degree murders are "death eligible." Further, the sweeping nature of §189 makes most murders able to be charged as first degree murders. Combining the effects of §190.2 with §189, most first degree murderers are [unconstitutionally] "death eligible."

In general, §189 creates three categories of murders which are first degree murders: murders committed by **one of seven listed means** [destructive device or explosive, weapon of mass destruction, knowing use of armor/metal penetrating ammunition, poison, lying in wait, torture, and "drive-by"]; **killings committed during the perpetration of one of thirteen felonies** [arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, torture, sodomy, lewd act on a child, oral copulation, and penetration with a foreign object]; and murders committed with **premeditation and deliberation**. The overlap between the special

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[11] Overall comparisons of death penalty statutes between states are necessarily imprecise, because of the different combinations of narrowing circumstances in the various statutes, because of differences in statutory language used to identify the particular circumstances, and because of differences in courts' interpretation of the circumstances. Nevertheless, the sheer number of special circumstances, the breadth of definition or interpretation of the various circumstances, the frequency of occurrence of the circumstances in actual murder cases, and the existence of certain

circumstances listed in §190.2 and the three groups of factors listed in §189 varies according to whether the murder is intentional or unintentional.

It is apparent that California's death penalty statute is extremely broad. The California Commission on the Fair Administration of Justice recently recognized the breadth of California's death penalty statute:

> Several of the witnesses who testified before the Commission suggest the primary reason that the California Death Penalty Law is dysfunctional is because it is too broad, and simply permits too many murder cases to be prosecuted as death penalty cases. The expansion of the list of special circumstances in the Briggs Initiative and in subsequent legislation, they suggest, has opened the floodgates beyond the capacity of our judicial system to absorb. As former Florida Supreme Court Chief Justice Gerald Kogan told the Commission, having 21 special circumstances is "unfathomable. The problem is the front-end of the system. There are too many people eligible to receive the death penalty.

California Commission on the Fair Administration of Justice (June 30, 2008) *Report and Recommendations on the Administration of the Death Penalty in California* 60-61, *available at* http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf.) The Commission further concluded that "[u]nder the death penalty statute now in effect, 87% of California's first degree murderers are 'death eligible,' and could be prosecuted as death cases." (*Id.* at 18 [citing S. Shatz & N. Rivkind (1997) *The California Death Penalty Scheme: Requiem for Furman?* 72 N.Y.U.L.Rev. 1283, 1331].)

For example, in cases of *intentional* killings, five of the seven "means" listed in §189 (murders by destructive device or explosive, poison, torture, lying in wait and drive-by) are also enumerated special circumstances. (See Pen. Code §190.2, subds. (a)(4), (a)(6), (a)(15), (a)(18),

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collateral doctrines, (e.g., that the various felony-murder special circumstances apply even to unintentional and unforeseeable killings) sets California apart from all other states.

(a)(19), and a(21).)[12] It is likely that the remaining two "means" which do not intersect with §189 – use of a weapon of mass destruction or by armor piercing ammunition – would otherwise be death-eligible under several other special circumstances (e.g., multiple murder where a WMD was used, or murder of a law enforcement officer using armor piercing ammunition. (Pen. Code §190.2, subds. (a)(3) and (a)(7) and (a)(8).) In addition, all thirteen felonies listed in §189 are also special circumstances. (See Pen. Code §190.2, subds. (a)(17)(A)-(L), (a)(18).)

Other cases of *intentional* first degree murders which do not expressly qualify for the death penalty are those where the first degree murder is established by proof of premeditation and deliberation *and nothing else* – a highly unlikely scenario given the fact that some of these murders are capital murders because the defendant committed another murder (Pen. Code §190.2, subds. (a)(2), (a)(3)), the defendant acted with a particular motive (Pen. Code §190.2, subds. (a)(1), (a)(5), (a)(16)) or the defendant killed a particular victim (Pen. Code §190.2, subds. (a)(7) - (a)(13)). Many, many others qualify as capital murders because they are committed during an enumerated felony (Pen. Code §190.2, subds. (a)(17)(A)-(L)). Virtually all of the remaining premeditated murders also would be capital murders because, by definition, most premeditated murders are done while the defendant is "lying in wait." (Pen.Code §190.2, subd. (a)(15).)[13]

Historically, lying in wait is established if the defendant: (1) concealed his purpose to kill the victim, (2) watched and waited for an opportune time to act and (3) immediately thereafter

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[12] There are some slight differences in wording having no substantive effect.

[13] While every state includes lying in wait as a theory of premeditation, California is one of only four states that include lying in wait as either a special circumstance or a factor in aggravation. Two of the states, Montana and Colorado, require the killing occur while the defendant is lying in wait. (*State v. Fitzpatrick* (1980) 186 Mont. 187, 260-261; *People v. Dunlap*, (Col. 1999) 975 P.2d 723, 751-752.) The third, Indiana, requires actual physical

launched a surprise attack on the victim from a position of advantage. (*People v. Morales* (1989) 48 Cal.3d 527, 557, cert. den. (1989) 493 U.S. 984.) The second element – watching and waiting – adds nothing to premeditation and deliberation since the duration of the watching and waiting need only be "such as to show a state of mind equivalent to premeditation or deliberation." (*People v. Edelbacher, supra*, 47 Cal.3d at 1021 (emphasis and citation omitted).) As for the other two elements, it will be a rare premeditated murder -- i.e., "as a result of careful thought and weighing of considerations . . . carried on coolly and steadily, [especially] according to a preconceived design" (*People v. Bender, supra*, 27 Cal.2d at p. 183) – where the defendant reveals his purpose in advance or fails to try to take the victim from a position of advantage. As Justice Mosk succinctly stated:

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales, supra*, 48 Cal.3d at 575 [dis. opn. of Mosk, J.]; see also *People v. Ceja* (1993) 4 Cal.4th 1134, 1147 [conc. opn. of Kennard, J.].)

The 1978 Death Penalty Initiative "lying in wait" special circumstance read as follows: "The defendant intentionally killed the victim while lying in wait." (Pen. Code §190.2 (a)(15).) The court in *People v. Domino* (1982) 129 Cal.App.3d 1000, 1007-1012, was asked to address the "narrowing" issue raised by the two nearly identical code sections which did not seem to distinguish between defendants guilty of first degree murder and those eligible for the death penalty. The Court concluded that the category of murders committed "while" lying in wait

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concealment for the lying in wait aggravant. (*Davis v. State* (Ind. 1985) 477 N.E.2d 889, 895-897, Ind. Code Ann. 35-50-2-9(b)(3).)

(§190.2) was narrower than those committed "by means of" (§189) lying in wait. *Domino* found that the killing "must take place during the period of concealment and watchful waiting, or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends [or] . . . the circumstances calling for the ultimate penalty do not exist." (*Ibid.* at 1011.)

Even though in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1022, the California Supreme Court expressed doubts about the validity of this distinction, and in *People v. Morales* (1989) 48 Cal.3d 527, 558, expressly stated that it "need not consider the validity of [the defendant's] restrictive interpretation of the special circumstance provision," the Court increasingly came to rely upon the temporal distinction without such qualification.

Morales, however, was the beginning not the end of efforts to define and distinguish California's special circumstance lying in wait, particularly after later decisions from the Supreme Court seemed to broaden the application of lying in wait. *Morales* itself concluded that no actual concealment was required (*Morales, supra*, 48 Cal.3d at 554-555; *People v. Webster* (1991) 54 Cal.3d 411, 448.) In later cases, the Court found that the "substantial" watching and waiting period need only be a few minutes (*People v. Edwards* (1991) 54 Cal.3d. 787, 825-826); that the defendant need not strike his blow from the place of concealment. (*People v. Hardy* (1992) 2 Cal.4th 86, 164); that the defendant need not actually watch the victim as long as he was "'watchful,' i.e., alert and vigilant in anticipation of [the victim's] arrival." (*People v. Sims* (1993) 5 Cal.4th 405, 433.)

The California Supreme Court has found the victim could be "surprised" within the meaning of lying in wait even though she was arguing with the defendant when the killing occurred. (*Ceja, supra*, 4 Cal.4th at 1142-1145.) And the killer could still "surprise" if he was

behind the victim, or if he shouted at the victims to get their attention, or he could openly approach the victim as long as his purpose was concealed. (*People v. Morales*, *supra*, 48 Cal.3d at p. 575; *People v. Edwards*, *supra*, 54 Cal.3d. at p. 825; *People v. Webster*, *supra*, 54 Cal.3d at p. 448.)

The killer could even announce his purpose if the announcement came close in time to the killing. In *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, the Supreme Court held that the jury could reasonably have found the lying in wait special circumstance proven beyond a reasonable doubt in a case where the defendant held a knife to the victim who was unquestionably aware of his presence and said "I ought to kill you." Justice Kennard discussed the implications of this Court's decisions broadening the application of lying in wait:

> Unlike first degree murder perpetrated by lying in wait, the lying in wait special circumstance must provide a meaningful basis for distinguishing capital and noncapital cases, so that the death penalty will not be imposed in an arbitrary or irrational manner. [Citation omitted.] Recent decisions of this court have given expansive definitions to the term "lying in wait," while drawing little distinction between "lying in wait" as a form of first degree murder and the lying in wait special circumstance, which subjects a defendant to the death penalty.... I have a growing concern ... that these decisions may have undermined the critical narrowing function of the lying in wait special circumstance . . . .

(*People v. Ceja*, *supra*, 4 Cal.4th at 1147 (emphasis added and citations omitted), see also *People v. Hillhouse*, *supra*, 27 Cal.4th. at 513, Kennard J., concurring; *id.* at pp. 513-515, conc. and diss. opn. Moreno, J.)

That "critical narrowing function" was completely obliterated by the passage of Proposition 18 in 2000. Before the voters passed this proposition, there was a difference, albeit "thin," between the special circumstance "lying in wait" allegation and requirements under §189. Now there is none. Proposition 18 specifically eliminated the distinction between §189 and §190.2:

> This measure amends state law so that a case of first degree murder is eligible for a finding of a special circumstance if the murderer intentionally killed the victim "by means of lying in wait." In so doing, this measure replaces the current language establishing a special circumstance for murders committed "while lying in wait." This change would permit the finding of a special circumstance not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder.

California Legislative Analyst, Proposition 18 proposal (2000). The change to Penal Code §190.2(a)(15) literally changed the statute to mirror the text and interpretation of §189: "The defendant intentionally killed the victim *by means of* lying in wait."

In sum, while there will be occasional premeditated murders not done with any of the other listed means or during the listed felonies,[14] it is undeniable that the overwhelming majority of intentional first degree murderers, particularly after the expansion of the "lying in wait" special circumstance, are death-eligible.

The situation is similar with regard to *unintentional* first degree murders. Since an unintentional killing cannot be done with premeditation and deliberation, virtually all unintentional first degree murders qualify as such because of the first degree felony-murder rule; and, even an *unintentional* killing during one of the listed felonies makes the actual killer death-eligible. While there are occasional unintentional first degree murders based on the listed means[15] or based on vicarious liability for a felony-murder[16] -- neither of which situations

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[14] See, e.g., *People v. Beltran* (1989) 210 Cal.App.3d 1295 (defendant's decision to kill apparently made after victim already being held at gunpoint).

15 See, e.g., *People v. Laws* (1993) 12 Cal.App.4th 786, 795-796 (defendant lay in wait to assault the victim and killed her by accident). However, some such unintentional killings can make the defendant death eligible. In *People v. Morse* (1992) 2 Cal.App.4th 620, 652, 654-655, after the defendant was arrested for possession of an anti-personnel bomb, two police officers were killed attempting to dismantle the bomb. Although the court overturned a first degree murder conviction based on the felony-murder rule (since reckless possession of bomb is not one of the listed felonies), it acknowledged that defendant could have been convicted of first degree murder on an implied malice theory for killing with a bomb. Defendant would then have been death-eligible because of the multiple murder. (See Pen. Code § 190.2(a)(3).)

invokes the death penalty -- such prosecutions are rare in comparison with ordinary felony-murders.

It is apparent not only that, definitionally, most first degree murders are capital murders, but also that most murders in California are first degree murders.[17] Most murders are first degree murders primarily because of the broad interpretation of lying in wait (discussed above) and because of the felony-murder rule. The expansive sweep of the felony-murder rule is a product of three factors. First, the felony-murder rule applies to the most common felonies resulting in death, particularly robbery and burglary,[18] crimes which are defined exceedingly broadly by statute and court decision. With regard to robbery, the courts have given the broadest interpretation to the "force or fear" element[19] and the "immediate presence" element.[20] With regard to burglary, California makes nearly any entry – even "entry" only by a tool;[21] or entry followed by felonious intent and subsequent entry into a room within the residence;[22] or entry with the intent to commit *any* felony or theft[23] – a burglary. (Pen. Code §459.)[24] Second, the

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[16] See, e.g., People v. Thompson (1992) 7 Cal.App.4th 1966, 1969-1970.

[17] The constitutionally required narrowing function might be served by a sufficiently narrow definition of the capital offense, but this is not the California scheme. (People v. Bacigalupo, *supra*, 6 Cal.4th at pp. 465-466, 468.)

[18] Among all of the other death penalty states, eleven do not make felony-murder robbery a narrowing circumstance, and eleven do not make felony-murder burglary a narrowing circumstance, and several others only apply the narrowing circumstance when the killing is intentional. (See Colorado Revised Stats. § 16-11-103(5)(g); Texas Pen. Code § 19.03(a)(2); and Wyoming Stats. 6-2-102(h)(xii).)

[19] See People v. Mungia (1991) 234 Cal.App.3d 1703 (forceful pursesnatch).

[20] See People v. Webster (1991) 54 Cal.3d 411, 440-441, cert. den. (1992) 503 U.S. 1009 (property taken was one-quarter of a mile away from victim).

[21] See *People v. Davis*, 18 Cal. 4th 712 (1998) ("We agree that a burglary may be committed by using an instrument to enter a building--whether that instrument is used solely to effect entry, or to accomplish the intended larceny or felony as well. Thus, using a tire iron to pry open a door, using a tool to create a hole in a store wall, or using an auger to bore a hole in a corn crib is a sufficient entry to support a conviction of burglary." *People v. Davis*, 18 Cal. 4th 712, 717,718.).

[22] See *People v. Sparks* (2002) 28 Cal. 4th 71 (defendant may form intent to commit a felony after entering a residence but before entering a specific room.

[23] See *People v. Salemme* (1992) 2 Cal.App.4th 775 (entry to sell fraudulent securities is a burglary).

[24] It does not appear that any of the other twenty-four states that list burglary as a narrowing circumstance would apply it to as many situations.

felony-murder rule applies to killings occurring even after completion of the felony, if the killing occurs during an escape[25] or as a "natural and probable consequence" of the felony.[26] Third, the felony-murder rule is not limited in its application by normal rules of causation[27] and applies to altogether accidental and unforeseeable deaths:

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon* (1983) 34 Cal.3d 441, 477.)

B. Penal Code Section 190.2 in Practice Does Not Narrow The Class of Death Eligible Murders

The breadth of §190.2 is more than just theoretical. The findings in the California Commission on the Fair Administration of Justice's death penalty report and the results from Professor Shatz's study confirm what is apparent from the face of the statute: in practice, §190.2 performs no genuine narrowing function.[28]

California's statutory scheme violates the Eighth Amendment in practice because it fails adequately to narrow the class of offenders eligible for the death penalty. This failure, reflected in the data set forth in The California Commission on the Fair Administration of Justice's death

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[25] See *People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165.
[26] See *People v. Birden* (1986) 179 Cal.App.3d 1020, 1024-1025.
[27] See *People v. Johnson* (1992) 5 Cal.App.4th 552, 561.

[28] Professor Shatz's 1997 study of was admitted into evidence in a federal habeas corpus proceeding. See, *Karis v. Calderon* (E.D. Cal. March 1, 1996) No. Civ. S-89-527 ("the magistrate judge found that the Shatz declaration is relevant to the issues . . . and that it will be helpful to the consideration of the claim. . . Such a finding is well supported. . ."). The issue continues to be litigated in Karis and in Frye v. Ayers, CIV S-99-628 LKK/JFM (E.D. Cal.); Ashmus v. Ayers, C 93-0594 TEH (N.D. Cal.).

penalty report and Professor Shatz's 1997 study, manifests itself in two ways. First, there is a nearly complete overlap between the definitions of first-degree murder and the criteria for death eligibility, thereby making the vast majority of first-degree murders statutorily death-eligible. Second, as a result of the breadth of the death-eligibility criteria, only a relative handful of the statutorily death-eligible class are actually sentenced to die. Just as in pre-*Furman* Georgia, there is a *de facto* "narrowing" that occurs, but the narrowing is determined not by statutory eligibility criteria, but rather by the exercise of essentially *unguided* and *unreviewable* discretion by prosecutors and juries. Under California's death penalty scheme, as in pre-*Furman* Georgia, being sentenced to die is akin to be struck by lightning.

In *Furman*, the Supreme Court, for the first time, invalidated a state's entire death penalty scheme because it violated the Eighth Amendment. As stated in Part I, because each of the justices in the majority wrote his own opinion, the scope of, and the rationale for, the decision was not determined by the case itself. In *Furman*, Justices Stewart and White concurred with one another in holding that the death penalty was unconstitutional because a handful of murderers were arbitrarily singled out for death from the much larger class of murders who were death-eligible. (*Ibid.* at 309-310 (Stewart, J., concurring), 331-313 (White, J., concurring).

In *Gregg v. Georgia* (1976) 428 U.S. 153, the plurality understood the Stewart and White view to be the "holding" of *Furman* (*Ibid.* at 188-189); and in *Maynard v. Cartwright* (1988) 486 U.S. 356, a unanimous Court cited to the opinions of Stewart and White as embodying the *Furman* holding. (*Id.* at 362.) See also *Walton v. Arizona* (1990) 497 U.S. 639, 658-659 (Scalia, J., concurring). At the time of the decision in *Furman*, the evidence before the court established, and the justices understood, that approximately 15 to 20 percent of those convicted of capital murder were actually sentenced to death. Chief Justice Burger stated this statistic on behalf of

the four dissenters (408 U.S., at 386 n.11), and Justice Stewart relied on Justice Burger's statistics when he said: "[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder." (408 U.S. at 309 n.10.)[29] Thus, while Justices Stewart and White did not address precisely what percentage of statutorily death-eligible defendants would have to receive death sentences in order to eliminate the constitutionally unacceptable risk of arbitrary capital sentencing, *Furman*, at a minimum, must be understood to hold that any death penalty scheme under which less than 15 to 20 percent of statutorily death-eligible defendants are sentenced to death permits too great a risk of arbitrariness to satisfy the Eighth Amendment.

It cannot be overstated: in order to meet the concerns of *Furman*, the states were required to genuinely narrow, by rational and objective criteria, the class of murders eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the state of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.) It was the Court's understanding that, as the class of death-eligible murderers was narrowed, the percentage of those in the class receiving the death penalty would go up and the risk of arbitrary imposition of the death penalty would correspondingly decline:

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[29] In *Gregg*, the plurality reiterated this understanding: "It has been estimated that before Furman less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment." (428 U.S. at 182 n.26, citing *Woodson v. North Carolina*, 428 U.S. 280, 295-96 n.31).

The pre-*Furman* experience in California was consistent with the Court's understanding. Evidence before the Court for the years 1964, 1967, and 1969 indicated that approximately 16% of California's first degree murderers were being sentenced to death. (*Aikens v. California* (1972) 406 U.S., 813 (Brief for Petitioner, Appendix F at 4f-5f).

> As the types of murders for which the death penalty may be impose become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate...it becomes reasonable to expect that juries -- even given discretion not to impose the death penalty -- will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly **or so infrequently that is loses its usefulness as a sentencing device.**

(*Gregg v. Georgia* (1976) 428 U.S. 153, 222, White, J., concurring, (emphasis added).)

States could accomplish this statutory narrowing in one of two ways: by very narrowly redefining capital murder to exclude a substantial proportion of traditional first-degree murders[30] or, in states (like California) with broad definitions of first-degree murder (and in the few states with no degrees of murder), by the use of statutory-aggravating circumstances. To meet this constitutional narrowing requirement, the aggravating circumstances ("special circumstances" in California) had to "genuinely narrow" the class eligible for the death penalty, (*Zant v. Stephens*, *supra*, at 877), reducing that class to less than a majority (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319) of pre-*Furman* death-eligible murders.

The California scheme found at Penal Code §190.2 does not come close to satisfying *Furman*. Professor Shatz examined data from first degree murder cases during 1988-1992 ("1997 Study"). In the 1997 Study he concluded that the overwhelming majority (at least 84 percent) of first-degree murderers are statutorily death-eligible[31]. During the same time frame, the California Department of Justice statistics reported only 8.2 to 11.8 percent of convicted first-degree murderers in California being sentenced to death.[32] If that conclusion is correct the

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[30] This was the route taken by Louisiana and approved by the Supreme Court in *Lowenfield v. Phelps* (1988) 484 U.S. 231.

[31] Notably, former Justice Broussard of the California Supreme Court reached this same conclusion without benefit of a formal survey: "California's 1978 statute...sweeps so broadly that most murders are subject to the death penalty, and only a few are excluded." *People v. Adcox* (1988) 47 Cal.3d 207, 275, cert. denied, (1990) 494 U.S. 1038. (Broussard, J., concurring).

[32] S. Shatz & N. Rivkind, *supra* note 10 at p. 1327-1328.

special circumstances cited in §190.2 do not narrow the death-eligible class to anywhere near to a number less than the majority of first-degree murders. In fact, if at least 84 percent of first-degree murderers are statutorily death-eligible, taken together with the Justice Department statistics, the death penalty is being imposed on no more than approximately 9.6 to 14 percent of death-eligible first-degree murderers. That percentage is substantially lower than the percentage that the *Furman* Court – which was held to be so low as to violate the Eighth Amendment. The overall death sentence rate fell to 5.8 percent in the Alameda study, even farther below the unconstitutional rate that existed at the time of *Furman.*

In *Loving v. United States* (1996) 517 U.S. 748, 754-756, the Court cited *Furman*, and subsequent cases, in support of the constitutional proposition that a death penalty statute which restricted death-eligibility to only premeditated and felony murders "does not narrow the death-eligible class in a way consistent with our cases." A statute like California's which permits death-eligibility for virtually all first degree murderers is certainly no less violative of the Eighth Amendment.

It is not as though our death penalty system, once down an unconstitutional path, is helpless in remedying its glaring constitutional flaws in order to attempt to travel down a constitutional road. In the ongoing discussion surrounding the continued vitality of the death penalty in the United States, commentators and reformers alike have discussed the issue of narrowing and how to resolve it. The solution to the problem is simple: statutorily reduce the pool of death-eligible first degree murderers, thus allowing this pool to face the death penalty in a non-arbitrary fashion. In California, that means decreasing the number of "special

circumstances" so that the term has some real meaning.[33] Although the California Commission on the Fair Administration of Justice did not make a recommendation regarding narrowing the list of special circumstances in its report on the death penalty, it did note:

> Some of the gravest concerns about the fairness of the death penalty might be alleviated or eliminated if its use were limited to the most aggravated cases. The current list of 21 factual circumstances under which a defendant is eligible for a death sentence could be eliminated in favor of a simpler and narrower group of eligibility criteria.

California Commission on the Fair Administration of Justice (June 30, 2008) *Report and Recommendations on the Administration of the Death Penalty in California* 66-67. Four of the commissioners wrote separately to explicitly support narrowing the list of special circumstances. (Separate Statement of Commissioners Jon Streeter, Kathleen (Cookie) Ridolfi, Michael Hersek, and Michael Lawrence Accompanying Report and Recommendations on the Administration of the Death Penalty in California (June 30, 2008) 4-9.)

Commentators from other states facing the same issue reached a similar conclusion. For example, after its exhaustive review of the Illinois death penalty system, the Ryan Commission unanimously agreed that reducing the list of 20 eligibility factors existing under Illinois law would be one way of limiting the danger of arbitrariness in its death penalty scheme. The majority of members favored limiting the statute to five factors.[34] "While Commission members believe that all murders are very serious, the death penalty should be reserved for only the most heinous of these crimes." (Commission on Capital Punishment, April 2002, Recommendations

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[33] See Kozinski, Alex & Gallagher, Sean, *Death: The Ultimate Run-On Sentence*, (Fall 1995) 46 Case W. Res. 1. Justice Kozinski, a clear supporter of the death penalty, suggests that the most viable solution to the problem courts face dealing with the glut of death penalty cases – short of the courts repudiating decades of Eighth Amendment law – is for the legislature to curtail the numbers of persons eligible for the death penalty.

[34] The five eligibility factors recommended by the Commission are: (1) murder of a peace officer or firefighter in performance of/retaliation for duties; (2) murder of any person inside prison; (3) murder of two or more persons; (4) intentional murder involving the infliction of torture; (5) murder by person under investigation/convicted for a

Only, Ch. 4, Recommendations 27, 28.) Once the death penalty pool is limited, the imposition of the death penalty will not be so arbitrary as to compare with being struck by lightening.

III.

CONCLUSION

In *Bacigalupo*, the Supreme Court upheld the California death penalty scheme on the *assumption* that §190.2 served the constitutionally required function of defining "some narrowing principle" providing an objective basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not and thus "strictly confining" the class of death eligible murderers. (*People v. Bacigalupo*, *supra*, 6 Cal.4th at 465-468.) It is abundantly clear that the Court's assumption was ill-founded: §190.2 serves no such narrowing function. The problem with the California scheme is not that any one of the special circumstances taken alone is unconstitutional – each arguably identifies a subclass of all first degree murderers more deserving of the death penalty than other members of the class. The trouble is that taken together, the special circumstances cover virtually all first degree murders (and a substantial majority of *all* murderers), and, thus, they perform no constitutionally mandated narrowing function at all.

The basic concern in *Furman* was that when a state fails to place any objective limits on the imposition of the death penalty, it will necessarily be imposed in a random and unpredictable fashion, in violation of the Eighth Amendment:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are

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felony of anyone involved in the investigation, prosecution, or defense of that crime, including witnesses, jurors, judges, prosecutors and investigators.

among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

(*Furman v. Georgia, supra,* 410 U.S. at pp. 309-310 [footnote omitted].)

The voters of California, beginning with the Briggs Initiative, have voiced their intention to, and have accomplished, making virtually all first degree murderers death-eligible. Since 1978, it has become *de rigueur* for law enforcement and politicians to urge additions to the §190.2 rolls every time there is a high profile case. The end result, however, is plainly unconstitutional: on the one hand, a gigantic, indistinguishable pool of death penalty candidates, while on the other hand, the death penalty being sought, and actually being imposed, upon only a "freakish" few, in violation of both the Eighth Amendment of the United States Constitution, and article I, section 17 of the California Constitution. For this reason, Mr. Topete asks this Court to bar the prosecutor from seeking the death penalty in this case.

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Respectfully submitted,

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